

A **ABDUL SALAM HUSIN**

v.
MAJLIS ANGKATAN TENTERA & ANOR

B FEDERAL COURT, PUTRAJAYA
ARIFFIN ZAKARIA CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
JAMES FOONG FCJ
[CIVIL APPEAL NO: 01-13-2009(W)]
C 28 SEPTEMBER 2010

ARMED FORCES: *Appeal - Cancellation of commission as lieutenant - Right to be heard - Whether right available before Armed Forces Council makes recommendation to Yang di-Pertuan Agong - Armed Forces Act 1972, s. 9 - Federal Constitution, 135(1), (2)*
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CONSTITUTIONAL LAW: *Fundamental liberties - Right to be heard before dismissal - Whether no such right accorded before dismissal for member of armed forces - Armed Forces Act 1972, s. 9 - Federal Constitution, 135(1), (2)*
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The appellant was a member of the armed forces. He was commissioned as a second lieutenant of the Royal Malaysian Air Force ('RMAF'). He was then assigned as a senior logistic officer to the RMAF's base in Butterworth, Penang. The Armed Forces Council, responsible for the administration of the Armed Forces in Malaysia, decided to cancel the appellant's commission as lieutenant and recommended the cancellation to the Yang di-Pertuan Agong. The appellant was duly informed that the cancellation was done pursuant to s. 9 of the Armed Forces Act 1972. The cancellation was also published in the Government Gazette. The appellant, dissatisfied with the cancellation, filed an action in the High Court for declaratory reliefs, *inter alia*, that his purported cancellation was null and void. The High Court dismissed the action and so too the Court of Appeal on appeal. The appellant now appealed to this court on the following question:
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Whether an officer of the armed forces whose commission is cancelled by the Yang di-Pertuan Agong pursuant to s. 9 of the Armed Forces Act 1972, although not required to be heard by the Yang di-Pertuan Agong, having regard to art. 135(1) and (2) of the Federal Constitution, is nevertheless entitled to be heard by the Armed Forces Council before it makes its recommendation to the Yang di-Pertuan Agong.
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Held (dismissing the appeal)**Per James Foong FCJ delivering the judgment of the court:**

- (1) The right to be heard of a member of the armed forces before dismissal was excluded by cl. 1 art. 135 of the Federal Constitution. Unlike members of other public services who had such a privileged right by virtue of cl. 2 art. 135, members of the armed forces did not enjoy such a privilege. (para 11)
- (2) The most prevalent reason for the rationale behind the exclusion of a right to be heard before dismissal was based on the fact that the commission of a member of the armed forces could be withdrawn or cancelled at any time at the pleasure of the Crown and that being so, the Crown was under no obligation to give any reasons (See *Re: Tufnell, Ridge v. Baldwin, R v. Governor of Darlington School, Government of Malaysia v. Mahan Singh*). Also, on public policy grounds members of the armed forces played an important role in the defence of the nation. The continuance of any of its members might be detrimental to the best interest of the State thereby compromising the country's security. Further, the necessity to maintain discipline within the armed forces was vital if the military was to be functional and efficient. Any compromise thereto would affect discipline and threaten the chain of command necessary to effectively defend the nation. (paras 17-19)
- (3) The supreme law of the land and the Armed Forces Act 1972 expressly and unequivocally excluded a right to be heard before dismissal for members of the armed forces. The exclusion was not only limited to when the Yang di-Pertuan Agong cancelled the commission but also extended to when the Armed Forces Council deliberated on the recommendation to be made. It followed that the exclusion must apply throughout and at every stage leading to the cancellation of the commission to give effect to the objective and intention of those provisions of the law. The entire process, though involving stages, could not be taken separately and by piece meal and to include a right to be heard at a particular stage as that would render cl. 1 art. 135 of the Federal Constitution and s. 9 of the Armed Forces Act 1972 frivolous and nugatory. (para 20)

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- A (4) It was the court's duty to give effect to the provisions of the
Federal Constitution and statutory laws without attempting to
modify and qualify them, particularly where there was no
ambiguity. Where the laws were explicit and enacted for good
measures, common law rights of *audi alteram partem* should be
discounted (See *Twist v. Randwick Municipal Council*, *Selvaraju*
B *Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor*;
Public Services Commission Malaysia & Anor v. Vickneswary RM
Santhivelu). Not all common law principles relating to natural
justice were applicable (See *Lloyd v McMahon*; *S Kulasingam &*
C *Anor v. Commissioner of Lands, Federal Territory & Ors*).
(paras 21-23)
- (5) In view of the explicit provisions in the law divesting a right to
be heard before dismissal of members of armed forces, the
Federal Court was in no position to lend a hand in interpreting
D into the law such a right. Any attempt to read into the law the
existence of such a right at some stage of the process would
defeat the true intention and spirit of the Federal Constitution
and the relevant provision of the Armed Forces Act 1972. It
followed that the answer to the question posed before the
E Federal Court was in the negative. (paras 25-26)

Bahasa Malaysia Translation Of Headnotes

- F Perayu adalah seorang anggota pasukan tentera. Beliau telah
ditauliahkan sebagai seorang leftenan muda dan bertugas dengan
Tentera Udara di Raja Malaysia ('TUDM'). Beliau kemudian
ditugaskan sebagai pegawai logistik kanan di pengkalan TUDM
Butterworth, Penang. Majlis Angkatan Tentera, yang
bertanggungjawab terhadap pentadbiran angkatan tentera di Malaysia,
G telah memutuskan untuk membatalkan pentauliahan perayu sebagai
seorang leftenan dan telah mengesyorkan pembatalan tersebut kepada
Yang di-Pertuan Agong. Berikutnya, perayu telah diberitahu bahawa
pembatalan adalah dibuat berdasarkan s. 9 Akta Angkatan Tentera
1972. Pembatalan juga telah disiarkan di dalam *Gazet Kerajaan*.
H Tidak berpuashati dengan pembatalan, perayu telah memfail
tindakan di Mahkamah Tinggi memohon relif deklaratori, antara
lain bagi mengisytiharkan pembatalan sebagai tak sah dan batal.
Mahkamah Tinggi menolak permohonan dan begitu juga dengan
Mahkamah Rayuan semasa rayuan. Perayu kini merayu ke
I mahkamah ini atas persoalan undang-undang berikut:

Sama ada seorang pegawai angkatan tentera yang pentauliahannya dibatalkan oleh Yang di-Pertuan Agong di bawah s. 9 Akta Angkatan Tentera 1972, walaupun tidak perlu didengar oleh Yang di-Pertuan Agong, namun, mengambilkira Fasal 135(1) dan (2) Perlembagaan Persekutuan, masih berhak didengar oleh Majlis Angkatan Tentera sebelum syor dibuat olehnya kepada Yang di-Pertuan Agong.

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Diputuskan (menolak rayuan)

Oleh James Foong HMP menyampaikan penghakiman mahkamah:

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- (1) Hak seorang anggota tentera untuk didengar sebelum pembuangan kerjanya telah digugurkan oleh perenggan 1 fasal 135 Perlembagaan Persekutuan. Berbeza dengan ahli lain-lain perkhidmatan awam yang mempunyai hak istimewa sedemikian berdasarkan perenggan 2 fasal 135, anggota-anggota tentera tidak memiliki keistimewaan tersebut. D
- (2) Sebab utama bagi rasional di sebalik pengguguran hak untuk didengar sebelum pembuangan kerja adalah diasaskan kepada fakta bahawa pentauliahan seseorang anggota tentera boleh dibuat atau dibatalkan pada bila-bila masa atas kehendak Seri Paduka Baginda, di mana Seri Paduka Baginda tidak bertanggungjawab untuk memberi sebab musabab baginya (Lihat *Re: Tufnell, Ridge v. Baldwin, R v. Governor of Darlington School, Government of Malaysia v. Mahan Singh*). Selain itu, berdasarkan alasan kepentingan awam, anggota-anggota angkatan tentera memainkan peranan penting dalam pertahanan negara. Penerusan perkhidmatan seseorang ahlinya mungkin akan membahayakan kepentingan Negara dan sekaligus mengkompromikan keselamatannya. Juga, keperluan menjaga disiplin di kalangan anggota tentera adalah penting untuk memastikan angkatan tentera terus berfungsi dan efisien. Sebarang kompromi terhadapnya akan menjejaskan disiplin dan menggugat rantaian arahan yang diperlukan bagi mempertahankan Negara secara efektif. E F G H
- (3) Undang-undang tertinggi Negara dan Akta Angkatan Tentera 1972 telah secara ekspres dan nyata menggugurkan hak untuk didengar sebelum pembuangan kerja bagi anggota-anggota angkatan tentera. Pengguguran bukan hanya terhad kepada keadaan bilamana Yang di-Pertuan Agong membatalkan I

- A pentauliahkan tetapi juga meliputi keadaan di mana Majlis
Angkatan Tentera membincangkan tentang syor yang hendak
dibuat. Ianya mengikut bahawa, demi memberi kesan kepada
objektif dan niat peruntukan undang-undang berkaitan,
pengguguran hak tersebut harus terpakai pada setiap masa dan
di semua peringkat yang membawa kepada pembatalan
B pentauliahkan. Keseluruhan proses, walaupun melibatkan banyak
peringkat, tidak boleh dilihat secara berasingan dan peringkat
demi peringkat atau sebagai merangkumi hak untuk didengar
untuk peringkat-peringkat tertentu, kerana itu akan menjadikan
C perenggan 1 fasal 135 Perlembagaan Persekutuan dan s. 9 Akta
Angkatan Tentera 1972 tidak bermakna dan sia-sia.
- (4) Menjadi tugas mahkamah untuk memberi kesan kepada
peruntukan Perlembagaan Persekutuan dan undang-undang
statut tanpa cuba mengubah suai atau mengenakan had-had
D terhadapnya, terutama di mana tidak terdapat apa-apa kekaburan
padanya. Di mana undang-undang adalah jelas dan digubal demi
kebaikan, maka hak undang-undang common *audi alteram
partem* tidak perlu diambil perhatian (Lihat *Twist v. Randwick
Municipal Council*, *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan
Awam Malaysia & Anor*; *Public Services Commission Malaysia &
Anor v. Vickneswary RM Santhivelu*). Tidak semua prinsip
undang-undang common berkaitan keadilan asasi boleh dipakai
(Lihat *Lloyd v McMahon*; *S Kulasingam & Anor v. Commissioner
of Lands, Federal Territory & Ors*).
- E F
- (5) Mengambil kira peruntukan-peruntukan jelas di dalam undang-
undang menggugurkan hak untuk didengar sebelum
pembuangan kerja anggota-anggota pasukan bersenjata,
Mahkamah Persekutuan tidak berada dalam keadaan untuk
membantu menterjemahkan hak sedemikian ke dalam undang-
G undang. Sebarang percubaan untuk membaca kewujudan hak
tersebut di dalam undang-undang di mana-mana peringkat
proses adalah bertentangan dengan roh dan niat sebenar
Perlembagaan Persekutuan serta peruntukan-peruntukan
berkaitan Akta Angkatan Tentera 1972. Ianya mengikut bahawa
jawapan kepada persoalan yang diajukan di hadapan Mahkamah
Persekutuan adalah berbentuk negatif.
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Case(s) referred to:

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC (**refd**)

Government of Malaysia v. Mahan Singh [1975] 1 LNS 48 FC (**refd**)

Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC (**refd**)

Lloyd v. McMahon [1987] AC 625 (**refd**)

Najar Singh v. Government of Malaysia & Anor [1974] 1 LNS 101 FC (**refd**)

Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivehu [2008] 6 CLJ 573 FC (**refd**)

Re Tufnell [1876] Ch D Vol III 164 (**refd**)

Ridge v. Baldwin and Ors [1963] 2 All ER 66 (**refd**)

S Kulasingam & Anor v. Commissioner Lands Federal Territory & Ors [1982] CLJ 65; [1982] CLJ Rep 314 FC (**refd**)

Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 6 CLJ 245 FC (**refd**)

Twist v. Randwick Municipal Council [1976] 136 ALR 106 (**refd**)

Legislation referred to:

Armed Forces Act 1972, s. 9

Federal Constitution, arts. 132, 135(1), (2)

For the appellant - Karpal Singh (Yvonne How with him); M/s Karpal Singh & Co

For the respondents - Narkunavathy Sundaeson SFC; AG's Chambers

[Appeal from Court of Appeal; Appeal No: W-01-99-1999]

Reported by Usha Thiagarajah

JUDGMENT**James Foong FCJ:****Introduction**

[1] The question posed to this court is straight forward:

Whether an officer of the armed forces whose commission is cancelled by the Yang di-Pertuan Agong pursuant to section 9 of the Armed Forces Act 1972, although not required to be heard by the Yang di-Pertuan Agong, having regard to Article 135(1) and (2) of the Federal Constitution, is nevertheless entitled to be heard by the Armed Forces Council before it makes its recommendation to the Yang di-Pertuan Agong.

A Background Facts

[2] The appellant was appointed a member of the Armed Forces on 1 July 1980. He was commissioned as second lieutenant of the Royal Malaysian Air Force (RMAF) on 11 April 1981. After completing a course in logistic, he was assigned as senior logistic officer to the RMAF's base in Butterworth, Penang and on 11 April 1985, he was promoted to lieutenant (RMAF).

[3] The Armed Forces Council, which is responsible for the administration of the Armed Forces in Malaysia, convened a meeting on 27 March 1986. It was decided at this meeting to recommend to the Yang di-Pertuan Agong the cancellation of the appellant's commission as lieutenant in the RMAF.

[4] By letter dated 7 May 1986, the appellant was informed that his commission as an officer of the RMAF was cancelled pursuant to s. 9 of the Armed Forces Act 1972. This was subsequently published in the Government Gazette bearing no. 5438 on 26 August 1986.

[5] Dissatisfied with this outcome, the appellant filed a civil suit in the High Court at Kuala Lumpur seeking the following reliefs:

- (a) a declaration that the purported cancellation of his commission is null and void;
- (b) a declaration that he remains a lieutenant in the RMAF with no loss to seniority, emoluments and benefits due to him as such;
- (c) damages;
- (d) an account be taken of all the salaries, emoluments and benefits due to him;
- (e) interest and costs.

H Appellant's Argument

[6] The appellant conceded that the armed forces come within the ambit of public services as stated in art. 132 of the Federal Constitution (Constitution) and by virtue of cl. 1 of art. 135 of the Constitution such member of the armed forces is not accorded the right to be heard before he is dismissed or reduced in rank. But, before the Yang di-Pertuan Agong cancels a commission of an

officer of the armed forces, s. 9 of the Armed Forces Act requires a recommendation from the Armed Forces Council. It is the contention of the appellant that since there is this requirement, he should have been accorded a right to be heard before the Armed Forces Council made the recommendation to the Yang di-Pertuan Agong. This common law right of *audi alteram partem* is not prohibited by the Constitution or by any statutory law. As the Armed Forces Council had not accorded to the appellant this right to be heard before the Armed Forces Council, there is a breach of natural justice. Consequently, as a result of this flaw in procedure he should be reinstated.

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[7] To appreciate this argument, I set out below the relevant parts of arts. 132 and 135 of the Constitution.

132. Public services

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(1) For the purpose of this Constitution, the public services are:

(a) the armed forces;

(b) the judicial and legal service;

(c) the general public service of the Federation;

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(d) the police force;

(e) (repealed)

(f) the joint public services mentioned in Article 133;

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(g) the public service of each State; and

(h) the education service.

(2) (not applicable)

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(2A) Except as expressly provided by this Constitution, every person who is a member of any of the services mentioned in paragraphs (a), (b), (c), (d), (f) and (h) of Clause (10) holds office during the pleasure of the Yang di-Pertuan Agong, and except as expressly provided by the Constitution of the State, every person who is member for the public service of a State holds office during the pleasure of the Ruler or Yang di-Pertuan Negeri.

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A 135. Restriction on dismissal and reduction in rank

(1) No member of any of the services mentioned in paragraphs (b) to (h) of Clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank: ...

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(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

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[8] As s. 9 of the Armed Forces Act is also relevant to this case, I reproduce this:

Cancellation of commissions

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[9] The Yang di-Pertuan Agong may on the recommendation of the Armed Forces Council at any time without assigning any reason therefore cancel any commission granted under the provisions of this Part.

The Decisions Of The Courts Below

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[9] The High Court dismissed the appellant's suit on these grounds:

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The plaintiff (appellant), as here, is governed by the Armed Forces Act 1972 and the court has no jurisdiction to inquire into circumstances under which he ceased to hold office. That being so, it is my finding that the purported cancellation of the plaintiff's commission by Yang di-Pertuan Agong under section 9 of the said Act is valid in law.

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In the premise and for reasons given, the writ and statement of claim is dismissed with costs.

[10] Dissatisfied with this decision, the appellant appealed to the Court of Appeal. His appeal was dismissed for these reasons:

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From the authorities and the statutory provisions aforesaid, I am of the view that the exclusion of the members of the armed forces from being afforded the right to be heard under Article 135(2) of the Federal Constitution applies to all stages of the termination process including the proceedings before the Council. To hold otherwise would mean that the cancellation of a commission of a member of the armed forces could no longer be made without cause and without reason. It would also be contrary to the well established common law principle which is preserved by section 9 of the Act.

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Under the Act, the power to cancel the appellant's commission is vested in the Yang di-Pertuan Agong, and it is a right exercisable at his discretion at any time without assigning any reason. In the present case it has been established, *vide* the said Gazette notification, that the Yang di-Pertuan Agong had exercised the power conferred upon him and assented to the cancellation of the commission. In my view, once it has been so established, it is not open for the court to make further inquiry on the propriety of the said cancellation.

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Analysis

[11] It is common ground that the right to be heard prior to the dismissal of a member of the armed forces is excluded by cl. 1 of art. 135. Unlike members of other public services whose right to be heard before dismissal or reduction in rank is protected under cl. 2 of art. 135 of the Constitution, members of the armed forces do not enjoy this privilege. There is a plethora of cases affirming such right to members of the other public services – see *Najar Singh v. Government of Malaysia & Anor.* [1974] 1 LNS 101; *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor.* [1994] 2 CLJ 333; *Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor. v. Utra Badi K. Perumal* [2001] 2 CLJ 525. The exemption of the armed forces from this is by the exclusion of para. (a) of cl. 1 of art. 132 of the Constitution.

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[12] The rationale for the exemption of the right to be heard before dismissal in the armed forces may be derived from the following authorities.

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[13] The first is *Re: Tufnell* [1876] Ch D Vol. III 164 where at 173 Mallins VC has this to offer:

It would be a most injurious thing to the public service if the Crown had not the power, which we know it has and exercise constantly, of saying to any naval or military officer misconducting himself, whether in his military or naval, or in his private capacity, simply by notice in the Gazette, that the Crown has no longer occasion for his services. It is an arbitrary power, and one which may be exercised most injuriously to the interests of the officer, but such is the benignity and the conduct of Government and of the Sovereign towards all officers, naval, military, or others, that it is never exercised arbitrarily or improperly, or except on proper

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A occasions, and it is absolutely necessary for the discipline of the army and navy, and for the good conduct of the public service, that an arbitrary power should exist.

[14] Then in *Ridge v. Baldwin and Ors* [1963] 2 All ER 66 at 71 Lord Reid said:

B ... It is always been held, I think rightly, that such an officer has no right to be heard before he is dismissed and the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reason. That was stated as long ago as 1670 in *R v. Stratford-upon Avon* where the corporation dismissed a town clerk who held office *durante bene placito*. The leading case on this matter appears to be *R v. Governors of Darlington School* [1844] 6 QB 682, although that decision was doubted by Lord Hatherley, LC in *Dean v. Bennett* [1870] 6 Ch. App. 489, 496 and distinguished on narrow grounds in *Willis v. Childe* [1851] 13 Beav. 117. I fully accept that where an office is simply held at the pleasure the person having power of dismissal cannot be bound to disclose his reasons. No doubt he would in many cases tell the officer and hear his explanation before deciding to dismiss him. But if he is not bound to disclose his reason and does not do so, then, if the court cannot require him to do so, it cannot determine whether it would be fair to hear the officer's case before taking action.

[15] In *R v. Governor of Darlington School (supra)*, a very old case where the master of a school was dismissed by its governors without a prior right to be heard, the court has these reasons to offer:

F A general want of reputation in the neighbourhood, the very suspicion that he has been guilty of the offences stated against him in the return, the concerned belief of the truth of such charges amongst the neighbours, might ruin the well being of the school if the master was to continue in it, although the charge might be untrue, and at all events the proof of the facts themselves insufficient before a jury.

[16] In the *Government of Malaysia v. Mahan Singh* [1975] 1 LNS 48, Suffian LP opined:

I I am of the opinion that the cardinal principle obtaining here during British rule lasting about 125 years that a public servant holds office at the pleasure of the Crown, is an important principle that should not be whittled away in the absence of express statutory word whittling it, for as stated by Sproule J in *Pillar's* case 6 FMSLR 160, 170 government employment being good for the public, it must

not continue when it is no longer for the public good; it is essential for the public good that the Crown should not be hampered in dismissing a servant whose continuance in office it deems detrimental to the best interests of the State and its good government, by any fear of suits in reprisal; indeed such continuance in office may be a danger to the community. The only amendment I would make to the above observation is that in the light of our Constitution, these days dismissal must comply with article 135.

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[17] From these nationals, the most prevalent reason seem to stem from the fact that the commission of a member of the armed forces is at the pleasure of the Crown: *durante bene placito* (which basically means: 'during our good pleasure'). When such commission is at the pleasure of the Crown then conversely it can be withdrawn or cancelled at any time at the pleasure of the Crown. The Crown is not obliged to give any reason for doing so.

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[18] Another reason for the deprivation of this right to be heard prior to cancellation of a commission is public policy. As members of the armed forces play an important role in the defence of the nation, the continuance of any of its members may at times be detrimental to the best interest of the State; the security of the country may be compromised if he is allowed to remain.

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[19] One other more pertinent reason is the necessity to maintain discipline within the armed forces which is absolutely vital if the military is to be functional and efficient. Any compromise to this would affect discipline and threaten the chain of command necessary to effectively defend the nation.

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[20] With the Constitution expressly exempting the armed forces from this right to be heard before cancellation of a commission, can it be argued that this is only limited to the time when the Yang di-Pertuan Agong cancels a commission and not when the Armed Forces Council deliberate on the recommendation to be made? It is my considered view that if the answer is in the positive, the entire provision of cl. 1 in art. 135 of the Constitution as well as s. 9 of the Armed Forces Act would be rendered meaningless. The supreme law of the land and the Armed Forces Act have expressly and unequivocally pronounced the exemption of this right to be heard for members of the armed forces and the rationale for this is already discussed. To give full effect to the objective and intention of these provisions of the law, it is my opinion that this exemption must

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- A apply throughout and at every stage leading to the cancellation of the commission. This entire process, though involving stages, cannot be taken separately and by piece meal and interject a right to be heard in a particular stage. If this were to be accepted, then cl. 1 of art. 135 of the Constitution and s. 9 of the Armed Forces Act would be frivolous and nugatory.

- [21] I wish to reiterate that it is the court's duty to give effect to the provisions of the Constitution and statutory law without attempting to modify and qualify it, particularly when there is no ambiguity. There are situations, like in this case, where the laws are explicit and enacted as such for good measures to discount such common law rights of *audi alteram partem* in the armed forces. In support of this proposition, I cite the often quoted passage by Barwick CJ of Australia in *Twist v. Randwick Municipal Council* [1976] 136 ALR 106:

- E if the legislation has made provision for that opportunity to (to be heard) be given to the subject before his person or property is so affected, the Court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the Court might think appropriate. Thus, if the legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the Court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.

- [22] This passage has been accepted with approval by this court in *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 6 CLJ 245 and *Public Services Commission Malaysia & Anor. v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573, 586.

- [23] To further support my view that not all common law principles relating to natural justice is applicable a passage in *Lloyd v. McMahon* [1987] AC 625, 703, 703 is of assistance:

- H My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.

In particular, it is well established that when a statute has conferred on anybody the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.

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[24] This is more forcefully put by Eusoffe Abdoolcader J in *S Kulasingam & Anor v. Commissioner Land, Federal Territory & Ors* [1982] CLJ 65; [1982] CLJ Rep 314, 317:

The rules of natural justice vary and ambit according to the circumstances and context ... approved the proposition that the Courts should not fly in the face of a clearly evinced Parliamentary intention to exclude the operation of the *audi alteram partem* rule.

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The legislature can by clear words exclude the principles of natural justice in the absence of specific constitutional guarantees. In an appeal from New Zealand the Privy Council approved of the idea that natural justice could be effectively excluded by a legislative code ... stating that it is not 'the function of the Court to re-draft the code' and referring with approval to the decision of the High Court of Australia ... which held in effect that it is not for the Court to amend the statute by engrafting upon it some other provision that it might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material.

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[25] To repeat, in this instant case there is clear provision of the law in cl. 1 of art. 135 of the Constitution read with art. 132 and s. 9 of the Armed Forces Act divesting such right to be heard for members of the armed forces prior to the cancellation of their commission of service. With such explicit provisions in the law, this court is in no position nor would it lend a hand in interpreting into the law such a right. This divested right applies to all stages or tiers leading to the cancellation of the commission. Any attempt to read into the law the existence of such right at some stage of this process would be defeating the true intention and spirit of the Constitution and the relevant provision of the Armed Forces Act.

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A Conclusion

[26] For reasons aforesaid, my answer to the question posed before this court is in the negative. Accordingly, this appeal is dismissed with costs.

B [27] My brother judges, Arifin Zakaria and Richard Malanjum have read this judgment in draft and associate themselves with it.

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